U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, VA 23606

(757) 591-5140 (TEL)
(757) 591-5150 (FAX)

Issue Date: 01 December 2004

Case No.: 2004-LHC-0919

OWCP No.: 5-113868

In the Matter of

ARCELIOUS CARLISLE,
Claimant

v.

CERES MARINE TERMINALS,
Employer

APPEARANCES:

ARCELIOUS CARLISLE
Pro se Claimant

ROBERT RAPAPORT, ESQ.
For Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter the Act), 33 U.S.C. § 901, et seq., brought by Arcelious Carlisle ("Claimant") against Ceres Marine Terminals ("Employer").

The only issue before the Court was Employer's entitlement to relief pursuant to § 8(f) of the Act. A formal hearing was held in Newport News, Virginia, on August 19, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:[1]

[1] The following abbreviations will be used as citations to the record: Tr – Transcript; JX – Joint Exhibit; EX – Employer's Exhibits; DB – Director's Brief; EB – Employer's Brief.

1. Joint Exhibit 1,
2. Employer's Exhibits 1-14[2].

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2004-LHC-0919 (JX-1):

1. That an employer/employee relationship existed at all relevant times.

2. That the parties are subject to the jurisdiction of the Act.

3. That Claimant sustained a compensable injury by accident, which arose out of and in the course of his employment with Employer on August 30, 2001, to his neck and right shoulder.

4. Timely notice of injury was given by Claimant to Employer.

5. Claimant filed a timely claim for compensation.

6. Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion.

7. Claimant's average weekly wage at the time of his injury was $1,366.50, resulting in a compensation rate of $911.00.

8. Employer has paid Claimant temporary total disability benefits from June 19, 2002, to June 24, 2003, at the compensation rate of $911.00 for 53 weeks, a total of $48,283.00.

9. Employer has paid Claimant temporary partial disability benefits from June 25, 2003, at the rate of $645.00 per week, which benefits are continuing.

10. Claimant reached maximum medical improvement as of June 25, 2003.

11. Claimant was diagnosed with, and treated for degenerative disc disease in his lower back.

[2] Exhibit 12 and Exhibit 15 were both the deposition testimony of Dr. Schaffer. Exhibit 15 was removed from the record by Employer when the exhibits were returned to the Court.

12. Claimant initially injured his lower back on January 3, 1986, and suffered numerous other injuries to his lower back over the years, prior to August 30, 2001.

13. Claimant cut back on driving jobs because of his low back injury and his permanent degenerative changes in his lower back for 10 to 12 years prior to August 30, 2001.

14. Claimant was diagnosed with osteoarthritis of his lower back on April 6, 1998.

15. Claimant injured his left knee on March 22, 1995, while working for Ryan Walsh, Inc. As a result of his left knee injury, surgery was performed resulting in permanent restrictions of limited walking and standing, with no prolonged stooping, kneeling or climbing of vertical ladders.

16. Prior to August 30, 2001, Claimant was able to avoid those positions on the waterfront which would violate his permanent restrictions concerning his knee and driving positions which aggravated his permanent low back injury.

17. Claimant was an A-Card holder, the highest seniority card in the Port, which allowed Claimant to select those jobs he was physically able to do and avoid positions he would not have been physically capable of performing.

18. As a result of injuries to Claimant's neck sustained on August 30, 2001, and subsequent surgery to his neck, Claimant could not return to work in lashing positions.

19. There were other positions on the waterfront which Claimant could have returned to even with the limitations to his neck but for the limitations to his left knee, shoulder and lower back.

Having reviewed the evidence submitted, the Court finds the above stipulations are supported by other evidence in the record.

DISCUSSION

Section 8(f) Relief

Section 8(f) was intended to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. See C& P Tel. Co. v. Director, OWCP, 564 F.2d 503, 512 (D.C. Cir. 1977). Without such

protection, employers would be justifiably hesitant to employ partially disabled workers for fear that any additional injury or subsequent aggravation of underlying conditions would result in a much greater degree of liability since such workers would suffer from a greater overall disability as a result of the second injury or aggravation than healthy workers would have. See Director, OWCP v. Campbell Indus., 678 F.2d 836, 839 (9th Cir. 1982). See also H. Rep. No 92-1441, 92nd Cong., 2d Sess. 8 (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; A. Larson, Workers' Compensation Law § 59.00 (1992). In furtherance of this goal, the provisions of § 8(f) are to be liberally construed. See Director v. Todd Shipyard Corp., 625 F.2d 317 (9th Cir. 1980).

Section 8(f) shifts part of the liability for permanent partial and permanent total disability from the employer to the Special Fund, established by Section 44, when the disability or death is not due solely to the injury which is the subject of the claim. The employer bears the burden of establishing its eligibility for § 8(f) relief. 20 C.F.R. § 702.321 (2004). In order to shift liability under § 8(f) three essential elements must be shown. The record must establish that: (1) the employee had a pre-existing partial disability; (2) the partial disability was manifest to the employer; and (3) it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). If those elements are met, an employer's liability is limited to 104 weeks of compensation.

There is an additional requirement in cases of permanent partial disability. In those cases, the disability must be "materially and substantially greater than that which would have resulted from the new injury alone." Director, OWCP v. Ingalls Shipbldg., Inc. (Ladner), 125 F.3d 303, 306 (5th Cir. 1997). Furthermore, the Fourth Circuit has held that the administrative law judge "may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines), 138 F.3d 134, 140 (4th Cir. 1998). An award of relief under this section must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. The standard established by the Fourth Circuit in Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., (Harcum I), 8 F.3d 175 (1993), aff'd, 514 U.S. 122 (1995), requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Carmines, 138 F.3d at 139. This quantification element is necessary because once the Employer establishes the level of disability in the absence of pre-existing permanent partial disability, this Court "will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater." Harcum I, 8 F.3d at 185.

The Director concedes, and the Court finds, that Claimant had pre-existing degenerative back, neck, right arm, right hand and left knee disabilities based on the medical reports submitted with Employer's Exhibits 1 through 12. Based on these same exhibits, the Director concedes, and the Court finds, that the pre-existing partial disability was manifest to Employer prior to the subsequent work-related injury. (DB at 5).

The issue for the Court to decide is whether Claimant's ultimate permanent partial disability materially and substantially exceeds the disability that would have resulted in the absence of the pre-existing disability. The Director asserts Employer has not met the standard established by the Fourth Circuit in Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., (Harcum I), 8 F.3d 175 (1993), aff'd, 514 U.S. 122 (1995), requiring quantification of the level of impairment that would ensue from the work-related injury alone.

In support of this element, Employer has presented the opinion of Dr. Eric Dominquez. Dr. Dominquez opined that 40% of Claimant's present disability is due to the pre-existing condition to Claimant's back and 20% is due to the pre-existing condition to Claimant's left knee. (EX 14). Dr. Dominquez opined that 40% of Claimant's present disability relates to his August 2001 neck injury. In reaching these opinions, Dr. Dominquez noted that the back injury resulted in permanent restrictions on Claimant's ability to climb ladders, do heavy lifting or stand for prolonged periods of time. Dr. Dominquez noted the knee injury limited Claimant's ability to stand for prolonged periods of time or to climb ladders. Both of these pre-existing injuries resulted in Claimant being unable to perform certain tasks on the waterfront. (EX 14).

Dr. Dominquez was aware of Claimant's performance on the functional capacity evaluation (FCE) of Claimant on December 12, 2003. Mr. Wayne MacMasters, a physical therapist with Tidewater Physical Therapy who conducted the FCE, assigned different restrictions for Claimant's pre-existing injuries, as well as his neck injury of August 30, 2001. Specifically, Mr. MacMasters found that 20% of Claimant's injury is due to a pre-existing injury to his leg, 20% is due to a pre-existing injury to his back, and 60% is due to the cervical injury. (EX 13 at 2). Mr. MacMasters also identified which occupational restrictions were the results of which injuries. Through this analysis, Mr. MacMasters was able to quantify the level of impairment and economic consequences for each injury.

These statements satisfy the requirements defined by the Fourth Circuit in Harcum I. Dr. Dominquez has provided "quantification of the level of impairment that would ensue from the work-related injury alone." Harcum I, 8 F.3d at 185. They are analogous to the objective quantification and clear descriptions that the Fourth Circuit found appropriate in granting § 8(f) relief in Harcum II. In Harcum II, the employer had submitted the report of a vocational rehabilitation specialist which quantified the claimant's earning capacity with and without the pre-existing injury. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Harcum II), 131 F.3d 1079 (4th Cir. 1997). Through this report, the employer was able to quantify the reduction in

claimant's wage-earning capacity that was due solely to the pre-existing disability and that which was the result of the work related injury at issue. Similarly, Dr. Dominquez's statement has specifically quantified the level of impairment that is the result of each injury. By assigning percentages to each injury, Dr. Dominquez's report provides evidence of the type and extent of disability the Claimant would suffer if not previously disabled when injured by the same work-related injury.

Moreover, Employer offered the testimony of Ms. Barbara Byers, a vocational rehabilitation counselor. Ms. Byers testified as to the occupational restrictions that resulted from Claimant's pre-existing injuries and the injury at issue in this claim. According to her testimony, Claimant "would have been limited to 49% of the occupations as defined in the dictionary of occupational titles" for the restrictions imposed based on his neck injury (the injury at issue in the case). (Tr. 12). The pre-existing injuries, however, "would restrict [Claimant] from 11% of occupations defined in the dictionary of occupational titles." (Tr. 12). This evidence is also relevant in an analysis of the contribution standard set forth in Harcum I. In its interpretation of this standard, the Fourth Circuit in Harcum II specifically stated that medical evidence is not the only evidence that could be used by an employer. Harcum II, 131 F.3d at 1082 (rejecting the contention that an expert must be a physician in order to give a qualified opinion). The vocational expert in Harcum II quantified the level of impairment from the work-related injury alone by testifying as to the claimant's reduction in wage earning capacity due to the pre-existing injury and the work related injury separately. Similarly, in the instant case, Ms. Byers has provided vocational evidence that individually quantifies the restrictions that each of Claimant's injuries has imposed on his ability to work.

The Fourth Circuit, however, has also cautioned that when the court is "assessing whether the contribution element has been met, an ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." Carmines, 138 F.3d at 140 (4th Cir. 1998). In Newport News Shipbuilding & Dry Dock Co. v. Ward, 326 F.3d 434 (4th Cir. 2003) the Fourth Circuit upheld the ALJ's determination that the employer's evidence lacked sufficient supporting explanation. In Ward, the doctor's assertions were described as generalized and his overall conclusions as lacking any supporting explanation. The court found that in particular, his statement that the claimant would have been able to "return to light duty Shipyard work" if he had suffered only one of his back injuries "is conclusory and lacks evidentiary support." Simply noting that an earlier injury rates a minimum 5% permanent disability rating under the AMA Guides, fails to assess the level of the claimant's disability that would have resulted from the later injury alone.

In contrast, Dr. Dominquez's findings are supported by other evidence in the record. The report notes that Claimant's pre-existing conditions regarding his back are permanent and resulted in permanent restrictions on Claimant's ability to climb ladders, do heavy lifting or stand for prolonged periods of time. (EX 14). These pre-existing permanent conditions limited Claimant's options for employment on the waterfront. (EX

14). Based on this evidence, Dr. Dominquez was able to quantify the percentage of Claimant's present disability that was due to pre-existing conditions. The report also supported Dr. Dominquez's conclusion that 20% of Claimant's disability is related to his pre-existing left knee condition. The report identified the pre-existing permanent disability to the knee and how it limited Claimant's ability to stand for prolonged periods of time or climb ladders. (EX 14). This evidence provides support for the conclusions drawn, so that Dr. Dominquez's statements are not generalized conclusory assertions, such as those found in Ward. See Ward 326 F.3d at 441 (finding the statement "neither the 1987 injury, nor the 1989 injury, alone would have disabled Mr. Ward from performing light duty Shipyard work" to be conclusory and lacking evidentiary support). Furthermore, Mr. MacMasters' letter and FCE, as well as, Ms. Byers's vocational testimony, provide support for Dr. Dominquez's conclusions. The work restrictions documented in this evidence support the percentages assigned to each injury.

Upon consideration of this evidence, I find that Employer has sufficiently quantified the level of impairment that would ensue from the neck and shoulder injury alone. Therefore, I find that Employer has satisfied the requisite three elements to be entitled to § 8(f) relief in regards to payment of compensation benefits related to Claimant's August 30, 2001 workplace accident.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall pay Claimant temporary total disability compensation for the time period from June 19, 2002 to June 24, 2003 based on an average weekly wage of $1,366.50.

2. Employer shall pay Claimant permanent partial disability compensation commencing from June 25, 2003 based on an average weekly wage of $1,366.50 and a compensation rate of $645.00 per week.

3. Employer is entitled to relief under § 8(f) of the Act and upon expiration of 104 weeks after June 25, 2003, such compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. § 944.

4. Employer shall pay all reasonable and necessary medical expenses related to the treatment of Claimant's neck and right shoulder injury.

5. Employer shall receive a credit for benefits and wages paid.

6. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

7. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.

8. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

A

LARRY W. PRICE
Administrative Law Judge

LWP/TEH